Court of Appeals, State of Michigan

ORDER

Robert Walters v Nathan Nadell

Docket No. 263503, 263504

LC No. 04-002395-NI

Kurtis T. Wilder
Presiding Judge

Brian K. Zahra

Alton T. Davis
Judges

The Court orders that the March 7, 2006 opinion is hereby VACATED, and a new opinion is attached.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 2 3 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT WALTERS,

Plaintiff-Appellant,

v

NATHAN NADELL,

Defendant-Appellee,

and

UTICA NATIONAL INSURANCE COMPANY,

Defendant-Appellee.

,

UNPUBLISHED
March 23, 2006

No. 263503
Jackson Circuit Court
LC No. 04-002395-NI

ROBERT WALTERS,

Plaintiff-Appellant,

v

NATHAN NADELL,

Defendant-Appellee.

No. 263504
Jackson Circuit Court
LC No. 04-005154-NI

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right orders granting summary disposition under MCR 2.116(C)(1) – (3) and (7) to defendants. We affirm.

I

On February 26, 2004, plaintiff, an Ohio resident, filed a complaint in circuit court, LC No. 04-2395-NI, against defendant Nadell, "a resident of Parma, Jackson County, Michigan" and defendant Utica to recover monetary damages for injuries sustained in a May 11, 2001 motor vehicle accident that occurred on U.S. 127 in Leoni Township, Michigan. A summons was issued with an expiration date of May 27, 2004. After the three-year period of limitation under MCL 600.5850(10) expired on May 12, 2004, and two weeks before the initial summons was scheduled to expire, plaintiff filed a motion to issue a second summons as to defendant Nadell to allow for service by August 22, 2004, given that Nadell was in the military and stationed outside the state of Michigan. The trial court granted plaintiff's motion and the clerk's office issued a second summons with an August 24, 2004 expiration date. When plaintiff was unable to perfect service against Nadell before the August 24, 2004 summons expired, plaintiff filed a motion seeking a "third summons" to allow for service by December 31, 2004. After a hearing, the trial court denied the motion.

On October 20, 2004, plaintiff filed a motion to amend the second summons to allow for service by February 25, 2005. In addition, plaintiff filed a complaint against Nadell individually, in a separate action, LC No. 04-5154-NI, and a summons was issued for that action with an expiration date of January 20, 2005. By order dated October 21, 2004, the trial court granted plaintiff's motion to amend the second summons and the clerk's office issued an amended second summons with a January 20, 2005 expiration date.[1] In the interim, plaintiff was able to perfect service against Nadell on December 10, 2004. Nadell was personally served at Fort Benning in Georgia by the county sheriff's office with both complaints, the amended second summons, and the summons for the refiled action.

On March 7, 2005, Nadell's attorney filed his limited appearance. Nadell's attorney also filed as his first responsive pleading, motions to quash the summons, to dismiss the action on grounds that the trial court lacked authority under MCR 2.102(D)-(E) to issue a third summons, and to dismiss the complaint against Nadell under MCR 2.116(C)(1) - (C)(3) and (C)(7).

After hearing arguments, the trial court granted Nadell's motion for summary disposition, concluding the court rules did not provide for the amendment of the second summons, so that there was no validity to the attempted service of Nadell under an amended summons. The trial court also rejected plaintiff's argument that the statute of limitations was tolled while Nadell was outside the state, concluding instead that alternative service was available pursuant to the non-resident motorist liability statute, MCL 257.403(a). Accordingly, the trial court granted Nadell's motion for summary disposition and dismissed plaintiff's complaint on the basis that plaintiff's

[1] The trial court's order provided for the summons to expire "on or about February 25, 2005." However, the clerk's office amended the second summons to extend only to January 20, 2005.

claim was time-barred.[2] Subsequently, on June 2, 2005, the trial court entered orders quashing the summons under MCR 2.102(D) and granting Nadell's motion for summary disposition to dismiss plaintiff's claims with prejudice under MCR 2.116(C)(1) (lack of jurisdiction); (C)(2) (the process issued in the action was insufficient); (C)(3) (the service of process was insufficient); and (C)(7) (statute of limitations). Plaintiff now appeals the grant of summary disposition in favor of Utica on plaintiff's first complaint LC No. 04-2395-NI, and the grant of summary disposition in favor of Nadell on plaintiff's second complaint, LC No. 04-5154-NI.[3]

II

Questions regarding whether a statute of limitation bars a claim and questions of statutory interpretation are reviewed de novo. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005). In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. See *Ostroth v Warren*, 263 Mich App 1, 313; 687 NW2d 309 (2004).

III

Plaintiff acknowledges that the three-year period of limitation under MCL 600.5850(10) expired on May 12, 2004, approximately seven months before service was perfected on December 10, 2004. However, plaintiff asserts that, pursuant to MCL 600.5853, tolling applies because Nadell was absent from the state. We disagree.

When faced with questions of statutory interpretation, the courts must discern and give effect to the Legislature's intent as expressed in the words in the statute. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Where the language is unambiguous, it must be presumed that the Legislature intended the meaning clearly expressed, and no further judicial

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[2] The trial court granted Utica's oral request that it, too, be granted summary disposition. The trial court denied Utica's earlier motion for summary disposition based on plaintiff's failure to serve Nadell. By order dated May 27, 2005, the trial court granted Utica's motion for summary disposition with prejudice.

[3] Plaintiff does not challenge the trial court's grant of summary disposition to Nadell on the first complaint, or the trial court's ruling on "the third summons issue." Therefore, we deem these claims abandoned on appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

interpretation is permitted; the statute must be enforced as written. *Id.*

MCL 600.5853 provides:

> If any person is outside of this state at the time any claim accrues against him the period of limitation shall only begin to run when he enters this state unless a means of service of process sufficient to vest the jurisdiction of a Michigan court over him was available to the plaintiff. *If after any claim accrues the person against whom the claim accrued is absent from this state, any and all periods of absence in excess of 2 months at a time shall not be counted as any part of the time limited for the commencement of the action* unless while he was outside of this state a means for service of process sufficient to vest the jurisdiction of a Michigan court over him was available to the plaintiff.

Contrary to plaintiff's argument, MCL 600.5853 did not operate to toll the statute of limitations under the facts of this case. The statute unambiguously provides that even if a person is absent from the state, no tolling occurs if means of service are available to vest the jurisdiction of Michigan courts, regardless of a defendant's official residency status. See e.g. *Ewing v Bolden*, 194 Mich App 95, 100; 486 NW2d 96 (1992). However, in this case, the trial court determined that the means of service available under the non-resident motorist liability statute, MCL 257.403(a), vested its jurisdiction. This was error.

MCL 257.403(a) reads in relevant part:

> (a) Service of summons in any action against a person, *who at the time of such service is a nonresident of this state*, growing out of any accident or collision in which such person may have been involved while operating a motor vehicle upon a public highway of this state or in which a motor vehicle owned by him may have been involved while being operated with his consent, express or implied, on such public highway, may be made upon the secretary of state as the true and lawful attorney of such person with the same legal force as if served on him personally within this state. Service of such summons . . . . and such service shall be sufficient service upon such nonresident, provided that notice of such service and a copy of the summons are forthwith either served upon the defendant personally by the sheriff or constable of the county in which he resides or sent by registered mail by the plaintiff or his attorney to the defendant.

MCL 257.403(a) is inapplicable to the facts of this case because the statute plainly applies to "nonresidents" and not Michigan residents. Thus, substitute service on the Secretary State is not available under MCL 257.403(a) to continue the running of the statute of limitations when a Michigan "resident" has not severed contact with the state. "Both absence and nonresidence where defendant is a nonresident are necessary to suspend the operation of the

statute."[4] *McLaughlin v Aetna L Ins Co*, 221 Mich 479, 483; 191 NW 224 (1922), citing *Campbell v White*, 22 Mich 178 (1871) and *Belden v Blackman*, 124 Mich 667, 669-670; 83 NW 616 (1900); See, e.g., *Hammel v Bettison*, 362 Mich 396, 397-409; 107 NW2d 887 (1961) (rejecting the plaintiff's argument that the period of limitation was suspended during the time that the defendant was absent from the state as personal service was available during the period the defendant lived in the state and that substitute service on the Secretary of State was available to the plaintiff when the defendant moved to another state).

Although the Court in *McLaughlin*, in requiring both absence and nonresidence, cited the relevant long arm statute in effect at the time, we find the Court's reasoning similarly applicable to MCL 257.403(a), given the Legislature's requirement that the defendant be "a nonresident of this state." In comparing the terms "reside," "residence," "domicile" and "non-resident," the Supreme Court stated:

> That the term "reside" is used in that sense sometimes imputed to it for the purpose of drawing a distinction between "residence" and "domicile," cannot be admitted. For by the meaning thus ascribed to it a person may be a resident of more than one country at the same time. As the phrase is employed here, it seems by necessity to imply something single and exclusive, and the reason is strong against reading it in a sense permitting a residence in Michigan and [another jurisdiction] at the same time. To give it that interpretation would make the condition of non-residence either absurd or nugatory. To satisfy the meaning of the legislature, the phrase must be understood as importing something so distinct, definite and fixed as to constitute the party's home the place of permanent abode, which, whenever left temporarily or on business, the party intends to return to, and on returning to, is at home.
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> "[T]hat this construction of the statute seems to be the only one which will afford a fixed, permanent and certain rule by which to ascertain whether a particular case is included within or excluded from the operation of the exception to the statute. If residence is not held to signify domicile, it can have, as applied to the subject matter, no definite and ascertained meaning; but it would be necessary to vary its interpretation in each particular case, according to the circumstances proved concerning the length of the absence of the debtor from the state, and the objects

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[4] The *McLaughlin* Court cited a similar provision to MCL 600.5853, Section 12327, 3 Comp Laws 1915, which provided:

> If at the time when any cause of action shall accrue against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into this State.

> for which he went away. There would be no standard by which to distinguish whether he could claim the benefit of the statute bar, or was excluded from the operation of the exception." [*Campbell, supra* at 196-197.]

Here, there is no real dispute that Nadell was absent from the state; however, plaintiff's complaint alleged that Nadell was a Michigan resident.[5] In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court must accept as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Bryant, supra* at 419; *Ostroth, supra* at 313. In this case, no documentation was submitted by defendants to establish Nadell's non-residency as required under MCL 257.403(a) to overcome the allegations in plaintiff's complaint irrespective of his military deployment(s). See also, *Steadman v Clemens*, 321 Mich 54, 57; 32 NW2d 45 (1948) (1970) (rejecting as "untenable," the plaintiff's theory that the statute of limitations would be tolled by reason of defendant's absence due to military service).

Accordingly the trial court erred in relying on MCL 257.403(a) as its basis for concluding that means of service are available to vest the jurisdiction of Michigan courts to continue the tolling of the statue of limitations. Nevertheless, plaintiff's claim is time-barred because the non-resident motorist statue is not the sole provision providing means of service to preclude application of the tolling provisions of MCL 600.5853. Contrary to plaintiff's argument, defendants' failure to establish Nadell's non-residency status is not dispositive. Under the court rules, "[p]rocess may be served on *a resident or nonresident* individual." MCR 2.105(A) (emphasis added). If service cannot be accomplished in the manner provided in the court rules, the court has discretion to authorize an alternate form of service in any manner, as long as it is "reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." MCR 2.105(I)(1). If a request for alternate service is made pursuant to MCR 2.105(I), service may be effectuated by posting. MCR 2.106.

In this case, there is no evidence in the record to show that plaintiff could not avail himself of any of the methods of service under the court rules or request alternate service pursuant to MCR 2.105(I). Therefore, given the plain language of MCL 600.5853 and plaintiff's failure to pursue alternative means of service, the statute did not toll the limitations period with regard to the purported summons extension of plaintiff's first and second complaints. Although the trial court's underlying reasoning was incorrect, the trial court reached the right result and we will not disturb its ruling on appeal. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004) (A trial court's ruling which reaches the right result, although for the wrong reason, may be upheld on appeal). For the reasons stated, summary disposition was properly granted.

Plaintiff next asserts that the statute of limitations was tolled under the Servicemembers Civil Relief Act of 2003 (SCRA), 50 USC App § 501 *et seq*. We decline to address this issue as

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[5] We also note that plaintiff also averred in his August 23, 2004 motion seeking a third summons that he actually observed Nadell in Rives Junction, MI.

unpreserved for appellate review, as it was not raised below and therefore could not be first addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We disagree with plaintiff's assertion that the facts of this case justify disregarding the applicable preservation requirements. See *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 628; 692 NW2d 388 (2004). Contrary to plaintiff's assertions, the SCRA does not apply to this case on a mandatory basis. While the SCRA as originally enacted, at 50 USC § 525, stated that "[t]he period of a servicemember's military service *shall* not be included" (emphasis added) in calculating the expiration of a period of limitation, the SCRA as amended in 2003 now states at 50 USC § 526 that "[t]he period of a servicemember's military service *may* not be included . . . ." (Emphasis added). This amendment renders the act discretionary, and because a full and complete record was not developed below concerning when a trial court may appropriately exercise its discretion to apply the SCRA to the facts of a particular case, there is no miscarriage of justice in our declining to review the question. See, e.g., *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis